

GREGORY C. SIMONIAN, ESQ. BAR#: 131162
VALERIE S. HIGGINS, ESQ. BAR # 238323
CLAPP, MORONEY, BELLAGAMBA and VUCINICH
A PROFESSIONAL CORPORATION
1111 Bayhill Dr., Suite 300
San Bruno, CA 94066
(650) 989-5400 (650) 989-5499 Fax
gsimonian@clappmoroney.com

Attorneys for Defendants
THE PARKINSON'S INSTITUTE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA- SAN JOSE DIVISION

LYNDA FRAYO,

Plaintiff,

v.

THE PARKINSON'S INSTITUTE, a
California Corporation, and DOES 1-50

Defendants:

CASE NO. C-07-04942-JF

DEFENDANT
THE PARKINSON'S INSTITUTE'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF RULE
12(f) MOTION TO STRIKE
PRAYER FOR ATTORNEY FEES.

Date: November 2, 2007

Time: 9:00 a.m.

Courtroom: 3, 5th Floor

I.

Introduction

By this motion, Defendant THE PARKINSON'S INSTITUTE respectfully requests the Court to issue an Order striking paragraph 4 of plaintiff LYNDA FRAYO's Prayer (Plaintiff's Complaint for Damages, page 7, line 15), pursuant to Federal Rule of Civil Procedure 12(f). Said paragraph seeks damages that are not recoverable as a matter of law.

II.

Statement of Facts

Plaintiff's Complaint for Damages was filed on July 26, 2007 in the Superior Court of California, County of Santa Clara. Defendant was served on August 23, 2007. Defendant filed a

1 Notice of Removal in the Northern District of California, San Jose Division and in the Superior
2 Court of California, County of Santa Clara, on September 24, 2007.

3 Plaintiff's Complaint sets forth a single cause of action for wrongful termination in
4 violation of public policy. As part of her prayer for relief, plaintiff includes paragraph four:

5 Wherefore, Plaintiff prays for judgment against
6 Defendants, and each of them, as follows:

7 . . .

8 4. For costs of suit and attorney fees.

9 Complaint for Damages, pg. 7, line 4. Plaintiff asserts no statutory or contractual basis for her
10 claim for attorney fees. *See*, Complaint for Damages.

11 **III.**

12 **Law and Argument**

13 Pursuant to *Federal Rule of Civil Procedure 12(f)*, a court may "order stricken from any
14 pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous
15 matter." Fed. Rule of Civ. Proc. 12(f). "Under Rule 12(f), courts have authority to strike a
16 prayer for relief seeking damages that are not recoverable as a matter of law." *Jacobsen v. Katzer*,
17 2007 U.S. Dist. LEXIS 63568 *11-12 (N.D.Cal. 2007); *See also*, *Wells v. Board of Trustees of*
18 *Cal. State Univ.*, 393 F.Supp.2d 990, 994-95 (N.D. Cal. 2005); *Arcilla v. Adidas Promotional*
19 *Retail Operations, Inc.*, 488 F.Supp.2d 965, 968 (C.D.Cal.2007); *Tapley v. Lockwood Green*
20 *Engineers, Inc.*, 502 F.2d 559, 560 (8th Cir. 1974.)

21 Under California law, a prevailing party may not be awarded attorney fees unless such
22 recovery is specifically provided for by statute or by agreement between the parties. Cal. Code of
23 Civ. Proc. § 1021.

24 In her Complaint for Damages, plaintiff Frayo sets forth a single cause of action for the
25 tort of wrongful termination in violation of public policy. She alleges no statutory or contractual
26 basis for her claim of attorney fees, and without a statutory or contractual basis, she is not entitled
27 to such an award. Because plaintiff is not entitled to attorney fees regardless of the outcome of
28

1 this matter, the court should strike plaintiff's prayer for attorney fees as a matter of law.

2
3 IV.

4 Conclusion

5 For the reasons stated above, this defendant The Parkinson's Institute respectfully requests
6 this Court to issue an Order striking paragraph 4 of plaintiff's prayer for relief.

7 DATED: September 26, 2007

CLAPP, MORONEY, BELLAGAMBA
and VUCINICH

9
10 By: Valerie S. Higgins

GREGORY C. SIMONIAN
VALERIE S. HIGGINS
Attorneys For Defendant
THE PARKINSON'S INSTITUTE